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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DANTE DANIEL GONZALES,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G059052

(Super. Ct. No. 18CF1823)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Michael F. Murray, Judge. Petition granted.

Sharon Petrosino, Public Defender, Sara Ross and Matthew Darling,
Deputy Public Defenders for Petitioner.

No appearance for Respondent.

Todd Spitzer, District Attorney and Deputy District Attorney David R. Gallivan for Real Party in Interest.

THE COURT:*

Respondent court denied petitioner's motion to reduce bail. Petitioner contends the court abused its discretion when it denied his motion and failed to reduce his bail according to the Emergency Bail Schedule. We agree, and therefore grant the petition.

FACTS

In June 2018 petitioner, Dante Daniel Gonzales, was arrested and charged in a felony complaint with human trafficking a minor (Pen. Code, § 236.1, subd. (c)(1)),¹ pimping a minor (§ 266h subd. (b)(1)), pandering with a minor by procuring (§ 266i subd. (a)(1) & (b)(1)), pandering (§ 266i subd. (a)), and misdemeanor destroying or concealing evidence.²

The underlying facts are not set forth in the petition, but according to the arresting officer's declaration filed pursuant to section 1269c in support of a motion to increase bail in an amount above the county bail schedule, police were called to a hotel where the occupants of a room refused to allow a woman to reenter to obtain her belongings. When police arrived they made contact with the occupants of the room, which included petitioner, his codefendant, and the victim. When interviewed, the victim, a minor, said she had been prostituting herself since December 2017 with a pimp

* Before Ikola, Acting P. J., Thompson, J., and Goethals, J.

¹ All further references are to the Penal Code unless otherwise noted.

² On the court's own motion and for good cause, the court takes judicial notice of the record in superior court case No. 18CF1823. (Evid. Code, § 452, subd. (d), § 459.)

in San Francisco when she was referred to petitioner for protection. The victim said she had been with petitioner since December 2017 and in the last six months she had earned approximately \$30,000, of which she paid petitioner approximately \$12,000. According to the officer's declaration, the "[victim] stated [petitioner] has never harmed her, threatened to harm her or taken all of her money."

The officer's declaration states further that after petitioner received *Miranda* warnings, he said he didn't know the victim "and that he arrived to the hotel drunk and does not remember anything." In addition to explaining the circumstances of the offense, the declaration seeking an increase in bail also states petitioner is from the San Francisco bay area and therefore "it is possible for him to flee California." Based on these facts, the officer recommended that petitioner's bail be set at \$500,000.

Not reflected in the docket, but according to the People, prior to petitioner's arraignment on the complaint, the Pretrial Services Unit approved the officer's declaration in support of the motion to increase bail and the request for a section 1275.1 hold, which requires petitioner to demonstrate that no portion of consideration used for posting bail was feloniously obtained. Thereafter, petitioner was arraigned in custody on a felony complaint and at the time of his arraignment, the officer's declaration was filed and the magistrate set provisional bail at \$500,000.

A preliminary hearing was conducted on August 23-24, 2018, and before petitioner was held to answer, the magistrate denied petitioner's oral motion to reduce bail and release the section 1275.1 hold.

On April 8, 2020, petitioner filed a motion for bail review, waiver of the section 1275.1 hold, and request for an order releasing petitioner on his own recognizance or reasonable bail "due to the global pandemic known as the coronavirus, or COVID-19."

The People opposed the motion, and in addition to the facts in the officer's declaration, the opposition states, "Defendant has dual citizenship. If the court reduces

his bail and lifts the section 1275.1 hold, there is a substantial likelihood defendant will leave the United States for Peru, where he is also a citizen. California Constitution, Article I, Section 28, subdivision (f)(3) specifically requires the court consider the probability of a defendant's appearing at his trial in setting or denying bail. Moreover, Emergency Rule of Court 4, subdivision (d) states that the constitutional provision in subdivision (f)(3) is still in force during the pandemic. [¶] 'Nothing in the Emergency Bail Schedule restricts the ability of the court to deny bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution. (Emergency Rule of Court, 4, subd. (d).)'"

In his reply, petitioner alleged that he is "suffering from breathing issues that have plagued him for years." In response to the People's claim that petitioner failed to allege a changed circumstance to justify a bail hearing, petitioner explained that his medical vulnerability constitutes a change in circumstances and because COVID-19 is a respiratory illness, "[a] person with pre-existing respiratory illnesses is more likely to suffer more serious symptoms, requiring hospitalization, intubation, and even death. Thus, he is medically at risk for contracting the virus and suffers a greater chance of serious complications or death should he get it."

In response to the claim that he represents a flight risk, petitioner stated that "his maximum exposure is 12 years in jail, which would be served at 50%. His offer from the prosecution was low-term of 5 years, [5, 8, 12] which would be served at half. He has almost 2 years of actual credits in jail awaiting trial. The idea that he is more likely to flee to avoid a prison term which he has almost completed, is farcical."

On April 14, 2020, respondent court conducted a hearing on the motion for bail review, waiver of the section 1275.1 hold, and request for an order releasing petitioner on his own recognizance or reasonable bail. The court denied the motion, and presumably in reference to the Emergency Bail Schedule adopted as a result of the COVID-19 pandemic, the court said, "The charges in this case are the kind of charges

that are specifically exempted from the new bail schedule, and so I don't find that this is the type of offense that should be reduced according to the new bail schedule. I find that this is one of the excepted cases that falls outside of the new bail schedule."

Petitioner filed a petition for writ of mandate in this court and he contends that respondent court abused its discretion when it failed to reduce his bail, or failed to exercise its discretion to reduce his bail, erred when it failed to vacate the section 1275.1 hold, and he was denied equal protection and due process of law as a result of respondent court's errors. Citing *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, this court ordered the People to file opposition to the petition solely on petitioner's claim that respondent court abused its discretion when it denied his motion to reduce bail.³

In their opposition, the People urge this court to summarily deny the petition and state, "[t]he issue is not whether the order fixing the amount of petitioner's bail above the countywide bail schedule was an abuse of discretion. This order was never challenged. The issue now before this Court is whether [respondent court] abused [its] discretion on April 14, 2020 when [it] denied petitioner's motion to reduce the amount of bail. [Respondent court] neither increased nor reduced the amount of bail set for petitioner."

Based on the facts in this case, respondent court abused its discretion when it failed to comply with the Emergency Bail Schedule in effect at the time of petitioner's bail hearing.

³ We find no merit and summarily deny petitioner's claim that respondent court erred when it denied his motion to vacate the custody hold issued pursuant to section 1275.1, and the claims that petitioner was denied equal protection and due process of law.

DISCUSSION

According to the 2020 Orange County Uniform Bail Schedule,⁴ “For all offenses and enhancements for which no presumptive bail is specified . . . the presumptive bail shall be set according to state prison top term potential for the offense plus enhancement.” Based on the offenses alleged in the complaint and the information, 12 years is the top term for human trafficking a minor in section 236.1(c)(1), and as such, the current Orange County bail schedule indicates the bail amount in this case is \$70,000.

However, section 1269c allows the magistrate or commissioner to set bail above the amount dictated by the bail schedule and states, “If a defendant is arrested without a warrant for a bailable felony offense . . . and a peace officer has reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is insufficient to ensure the defendant’s appearance or to ensure the protection of a victim . . . the peace officer shall prepare a declaration under penalty of perjury setting forth the facts and circumstances in support of his or her belief and file it with a magistrate . . . requesting an order setting a higher bail. . . . The magistrate or commissioner to whom the application is made is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant’s appearance or to ensure the protection of a victim . . . and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant’s release on his or her own recognizance.” (§1269c.)

Relying on the facts alleged in the officer’s declaration to increase bail, the magistrate followed the officer’s recommendation and increased petitioner’s bail to \$500,000. To give context to the amount of petitioner’s bail, which is set over 600 percent higher than the amount set in the bail schedule, presumptive bail for violent

⁴ On the court’s own motion and for good cause, the court takes judicial notice of the Orange County Superior Court 2020 Uniform Bail Schedule. (Evid. Code, §§ 459, 452, subd. (c).)

offenses such as voluntary manslaughter (§ 192 subd. (a)), rape in concert with force and violence (§ 264.1), kidnapping (§ 207), and carjacking (§ 215) are set at \$100,000.

Once a defendant has been arraigned in the trial court and he has been admitted to bail, the trial court in which the case is pending “may, upon good cause shown, either increase or reduce the amount of bail.” (§ 1289.)

While petitioner remained incarcerated pending trial, on March 4, 2020, the Governor declared a State of Emergency as a result of the threat of COVID-19. The day after the Governor signed shelter in place Executive Order N-33-20 on March 19, 2020, the Chief Justice of California issued a second advisory to superior court presiding judges and court executive officers and recommended courts “Revise, on an emergency basis, the countywide bail schedule to lower bail amounts significantly for the duration of the coronavirus emergency, including lowering the bail amount to \$0 for many lower level offenses – for all misdemeanors except for those listed in Penal Code section 1270.1 and for lower-level felonies.”⁵

On March 27, 2020, the Governor signed Executive Order N-38-20 as a vehicle for the Judicial Council to implement the Chief Justice’s recommendations.⁶ The order states that “In the event that the Judicial Council or its Chairperson, in the exercise of rulemaking authority consistent with Paragraph 2, wishes to consider a rule that would otherwise be inconsistent with any statute concerning a civil or criminal practice or procedure, the relevant statute is suspended, subject to the following conditions: [¶] a) The statute is suspended only to the extent it is inconsistent with the proposed rule; [¶] b) The statute is suspended only if the proposed rule is adopted; and [¶] c) The statute is

⁵ On the court’s own motion and for good cause, the court takes judicial notice of the Chief Justice’s Second Advisory on Emergency Relief Measures issued on March 20, 2020. (Evid. Code, §§ 459, 452, subd. (c).)

⁶ On the court’s own motion and for good cause, the court takes judicial notice of the Executive Order N-38-20, signed by the Governor on March 27, 2020. (Evid. Code, §§ 459, 452, subd. (c).)

suspended only when the adopted rule becomes effective.” The executive order explains, “The purpose of this paragraph is to afford the Judicial Council and its Chairperson maximum flexibility to adopt any rules concerning civil or criminal practice or procedure they may deem necessary to respond to the COVID-19 pandemic, while ensuring that the rules adopted ‘shall not be inconsistent with statute,’ as provided in Article VI, section 6 of the California Constitution.”

On April 6, 2020, the Judicial Council adopted 11 “Emergency Rules Related to COVID-19.”⁷ Emergency Rule 4, the Emergency Bail Schedule at issue in this case states, “Notwithstanding any other law, this rule establishes a statewide Emergency Bail Schedule, which is intended to promulgate uniformity in the handling of certain offenses during the state of emergency related to the COVID-19 pandemic.” (Rule 4(a).)

In contrast to the Chief Justice’s recommendation that presiding judges “[r]evise” their countywide bail schedule on an emergency basis, the Judicial Council required “Mandatory application” of the Emergency Bail Schedule in Rule 4 by the superior courts “[n]o later than 5 p.m. on April 13, 2020.”⁸ The rule states the Emergency Bail Schedule will “remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.” (Rule 4(b), (g).)

According to the Emergency Bail Schedule, “each superior court must apply the statewide Emergency Bail Schedule: [¶] (1) *To every accused person arrested and in pretrial custody* [and] [¶] (2) *To every accused person held in pretrial custody.*”

⁷ On the court’s own motion and for good cause, the court takes judicial notice of the 11 emergency rules adopted by the Judicial Council on April 6, 2020. (Evid. Code, §§ 459, 452, subd. (c).)

⁸ Both parties acknowledge that on April 8, 2020, the Orange County Superior Court adopted the Statewide Emergency Bail Schedule authorized by the Judicial Council in Administrative Order 20/12.

(Rule 4(b), emphasis added.) Rule 4(c) states, “Under the statewide Emergency Bail Schedule, bail for all misdemeanor and felony offenses *must* be set at \$0, with the exception of only the [13] offenses listed below[.]” (Rule 4(c), emphasis added.)

With respect to the 13 offenses or class of offenses excepted from \$0 bail in Rule 4(c), Rule 4(e) states, “The current countywide bail schedule of each superior court must remain in effect for all offenses listed in exceptions (1) through (13) of the Emergency Bail Schedule, including any count-specific conduct enhancements and any status enhancements.” (Rule 4 (e)(1).)

The Emergency Bail Schedule describes three circumstances when setting bail at \$0 does not apply. First is the list of 13 excepted offenses or class of offenses referenced in Rule 4(e)(1). With respect to bail set for the 13 offenses, the Emergency Bail Schedule states that “Each superior court *retains the authority* to reduce the amount of bail listed in the court’s current countywide bail schedule for offenses in exceptions (1) through (13), or for any offenses not in conflict with the Emergency Bail Schedule.” (Rule 4(e)(2), emphasis added.)

The second exception, not relevant to this proceeding, provides for bail for violations of felony parole, post-release community supervision, or mandatory supervision. The third circumstance in Rule 4(d) reminds the superior court of the constitutional authority to deny bail and states, “Nothing in the Emergency Bail Schedule restricts the ability of the court to deny bail as authorized by article I, section 12, or 28(f)(3) of the California Constitution.” (Rule 4(d).)

Because human trafficking a minor in subdivision (c)(1) of section 236.1 is an offense listed in subdivision (c) of section 290, it is exempt from the requirement that bail be set at \$0. (Rule 4(c)(10).) Petitioner contends that even though he is not entitled to have his bail reduced to \$0, it was an abuse of discretion when respondent court failed to comply with the Emergency Bail Schedule and reduce his bail to the amount reflected in the current countywide bail schedule.

We agree. According to the Emergency Bail Schedule respondent court had only three options when it considered petitioner's bail motion; set bail at the current countywide bail schedule, reduce bail below the countywide bail schedule, or deny bail pursuant to article I, section 12, or 28(f) subdivision (3) of the California Constitution.

The People contend however that respondent court was right to deny petitioner's motion, and this petition should be denied for three reasons. Citing to section 1289, which states that after the defendant has been admitted to bail on the information, "the Court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail," the People argue petitioner failed to establish good cause to justify bail reduction because good cause must be founded on a changed circumstance. (*In re Alberto* (2002) 102 Cal.App.4th 421, 430.) According to the People, respondent court correctly denied petitioner's bail motion because "[t]he only changed circumstance cited by petitioner was the onset of the COVID-19 pandemic. Petitioner failed to state how the pandemic affects any of his individualized bail factors," and as such, "[p]etitioner's motion to reduce bail was properly considered and denied by the superior court pursuant to Penal Code section 1289."

We disagree. Petitioner remained in custody from 2018 to 2020 without issue until the pandemic caused his preexisting condition to become a health risk if he remained in custody, and thus a changed circumstance and good cause for the court to reconsider the issue of bail. Presumably respondent court reached the same conclusion because it considered the merits of petitioner's motion when it said, "The charges in this case are the kind of charges that are specifically exempted from the new bail schedule, and so I don't find that this is the type of offense that should be reduced according to the new bail schedule. I find that this is one of the excepted cases that falls outside of the new bail schedule."

We also disagree with the People's first claim for two additional reasons. First, to the extent that section 1289 limits a bail hearing based on a showing of "good

cause,” the statute is inconsistent with the Emergency Bail Schedule which states it applies “*To every accused person held in pretrial custody,*” and according to Executive Order N-38-20, a rule that would otherwise be inconsistent with any statute concerning a civil or criminal practice or procedure, the relevant statute is suspended, subject to three exceptions not relevant in this context.

Second, petitioner did not seek a reduction of bail pursuant to section 1289, but a reduction pursuant to the Emergency Bail Schedule. Respondent court understood this to be the case and instead of considering the bail factors in section 1275, when respondent court denied petitioner’s motion it said, “The charges in this case are the kind of charges that are specifically *exempted from the new bail schedule*, and so I don’t find that this is the type of offense that should be *reduced according to the new bail schedule*. I find that this is one of the excepted cases that *falls outside of the new bail schedule*.” (Emphasis added.)

We also find no merit to the People’s second contention that the petition should be denied because “[p]etitioner misunderstands this provision [Rule 4(c)].” The People explain that “[b]y its plain reading, Emergency Rule 4 did not mandate that bail on all 13 excepted offenses must revert to a bail schedule.” According to the People, “[i]f that were the case, any defendant whose bail was previously reduced from the bail schedule for any of the listed 13 offenses would have his or her bail automatically increased without regard for a change in circumstances. Emergency Rule 4, subdivision (e)(1) merely states the bail schedule previously relied upon for the listed offenses remains unchanged.”

This argument sets up a straw man for no other purpose than to knock it down. Petitioner never claimed that bail set below the bail schedule would revert to the bail schedule, and no interpretation of the Emergency Bail Schedule suggests that bail already reduced for defendants charged with one of the 13 excepted offenses would “revert to a bail schedule,” or that bail previously reduced would “automatically increase

without regard [of] a change in circumstances.” The argument is especially specious given that the Emergency Bail Schedule specifically states, “Each superior court retains the authority to reduce the amount of bail listed in the court’s current countywide bail schedule for offenses in exceptions (1) through (13)” (Rule 4(e)(2).)

Last, the People contend that “nothing in Emergency Rule 4, or in the Orange County Superior Court’s adoption thereof, eliminated the magistrate’s Penal Code section 1269c authority to increase bail above a scheduled amount[, n]or did it eliminate the court’s ability to set, increase, or reduce a defendant’s bail pursuant to Penal Code sections 1275 and 1289.” Again, we disagree because this interpretation is inconsistent with the plain language in Rule 4.

“The Judicial Council . . . is the entity charged by the California Constitution with adopting statewide rules for court administration, practice, and procedure. [Citations.] The California Rules of Court “‘have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions.’” [Citation.] The rules applicable to interpretation of the rules of court are similar to those governing statutory construction. [Citation.] Under those rules of construction, our primary objective is to determine the drafters’ intent. [Citation.]” (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 125.) “We independently review interpretations of California Rules of Court, applying the usual rules of statutory construction.” (*In re William M.W.* (2019) 43 Cal.App.5th 573, 583.)

““In determining such intent, we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning.’ [Citation.]” (*People v. Standish* (2006) 38 Cal.4th 858, 869.) “The plain meaning controls if there is no ambiguity in the statutory language.” (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) “Ordinarily, the term ‘shall’ is interpreted as mandatory and not permissive. [] ‘[T]he presumption [is] that the word “shall” in a statute is ordinarily deemed mandatory and “may” permissive.’

[Citation.]” (*People v. Standish*, *supra*, 38 Cal.4th at p. 869.) “If, however, ‘the statutory language may reasonably be given more than one interpretation, “ ‘ “courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.” ’ ” ’ ” (*People v. Cornett*, *supra*, 53 Cal.4th at p. 1265.)

In order to reduce the incarcerated population, the Chief Justice recommended the superior court “[r]evise” its countywide bail schedule to reduce jail population. In response to this concern, the Judicial Council adopted the Emergency Bail Schedule in Rule 4. Rule 4 did not mandate that superior courts “[r]evise” their countywide bail schedule as recommended by the Chief Justice or later outlined in Rule 4. Instead, the Emergency Bail Schedule required mandatory application of Rule 4. As Executive Order N-38-20 explained, the Judicial Council was afforded “maximum flexibility to adopt any rules concerning civil or criminal practice or procedure they may deem necessary to respond to the COVID-19 pandemic,” and “a rule that would otherwise be inconsistent with any statute concerning a civil or criminal practice or procedure, the relevant statute is suspended”

If the superior court retained its discretion to deviate from the Emergency Bail Schedule to increase bail as suggested by the People, then naturally it also retained its discretion to reduce bail as well. But if the People’s interpretation of Rule 4 is correct, then the entirety of Rule 4(e)(2) which states, “[e]ach superior court retains the authority to reduce the amount of bail,” is redundant because according to the People, the court already had the authority to depart from the bail schedule to reduce bail. The People’s interpretation of Rule 4 would violate the rule of statutory construction that “[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word[s] surplusage.” [Citation.]” (*People v. Franco* (2018) 6 Cal.5th 433, 437.) As a general rule of construction, “We also generally avoid

[interpretations] that render any part of a statute superfluous.” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1030.)

We also find merit in the application of the tenet *expressio unius est exclusio alterius* in this context. As *People v. Standish, supra*, 38 Cal.4th 858, explains, “the presence of express exceptions ordinarily implies that additional exceptions are not contemplated. ‘[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed’ unless a contrary legislative intent is evident. [Citation.]” (*Id.* at p. 870.)

In this case, the Emergency Bail Schedule specifically states the superior court “retains the authority,” as in it keeps, holds on to, or preserves its authority to deviate from the Emergency Bail Schedule to reduce bail, which suggests the court did not automatically retain its discretion to deviate from the Emergency Bail Schedule until stated by the Judicial Council in Rule 4(e)(2). The fact that the rule omits the same express language to allow the superior court to increase bail suggests that its omission was purposeful under the circumstances because upward departure from the countywide bail schedule is inconsistent with the purpose of the Emergency Bail Schedule to reduce the jail population and “promulgate uniformity in the handling of certain offenses during the state of emergency related to the COVID-19 pandemic.”

Bail is reviewed for an abuse of discretion. (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) “‘Although mandamus does not generally lie to control the exercise of judicial discretion, the writ will issue “where, under the facts, that discretion can be exercised in only one way.” [Citations.]’ [Citation.] ‘Mandate lies to control judicial discretion when that discretion has been abused. [Citations.]’” (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047-1048; *Babb v. Superior Court* (1971) 3 Cal.3d 841, 850-851; Code of Civ. Proc., §1085.) At the conclusion of the bail hearing in this case, respondent court had three options: to set bail in the amount of the current bail schedule, reduce bail under the amount listed in the bail schedule, or deny bail pursuant

to article I, sections 12, or 28(f) subdivision (3) of the California Constitution. Not only did the respondent court not comply with the Emergency Bail Schedule in effect at the time of petitioner's hearing, the court believed petitioner's charges were "exempted from the new bail schedule," and therefore the order denying petitioner's motion to reduce bail constitutes an abuse of the court's discretion. Although the Judicial Council has since repealed the Emergency Bail Schedule effective June 20, 2020, petitioner is nonetheless entitled to relief and a new bail hearing.

DISPOSITION

Inasmuch as real parties were given notice pursuant to *Palma v. U.S. Industrial Fasteners, Inc., supra*, 36 Cal.3d 171, 180, the petition is GRANTED. Let a peremptory writ of mandate issue ordering respondent court to vacate its ruling entered on April 14, 2020, and conduct a hearing no later than 10 days from the date of this order at which respondent court sets bail according to the current 2020 Orange County Bail Schedule, reduces bail to an amount below the Orange County Bail Schedule, or denies bail pursuant to article I, sections 12, or 28(f) subdivision (3) of the California Constitution.

In the interest of justice, the opinion in this matter is deemed final as to this court and the clerk is directed to issue the remittitur forthwith. (Cal. Rules of Court, rule 8.490(b)(2)(A).)